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No. 88-1755

In The

Supreme Court of the United States

October Term, 1988

DWIGHT'S DISCOUNT
VACUUM CLEANER CITY, INC.,

Petitioner,

v.

THE SCOTT FETZER COMPANY,
KIRBY COMPANY DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent The Scott Fetzer Company, Kirby Company Division,[1] respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by petitioner Dwight's Discount Vacuum Cleaner City, Inc.,

[1] In compliance with Supreme Court Rule 28.1, respondent shows that The Scott Fetzer Company, Kirby Company Division, is a wholly owned subsidiary of BHSF, Inc., which is a wholly owned subsidiary of Berkshire Hathaway Corp.

seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on November 28, 1988.

OPINION BELOW

The judgments of the courts below are attached as appendices to Petitioner's petition.

STATEMENT OF THE CASE

Petitioner Dwight's Discount Vacuum Cleaner City, Inc., sued respondent The Scott Fetzer Company, Kirby Company Division, alleging conversion, interference with contractual rights, and violations of the Texas Deceptive Trade Practices-Consumer Protection Act, *Tex. Bus. & Comm. Code* §17.41 et seq., which creates causes of action for certain types of misrepresentation and unconscionable acts in the consumer setting. Respondent Kirby filed a counterclaim against Dwight's for tortious interference with its distributorship agreement. The opinion of the Court of Appeals accurately sets forth the factual background of this case. (App. to Pet. 20)

During the course of the jury trial Kirby moved for a directed verdict on the petitioner's claims under the Texas Deceptive Trade Practices Act generally and specifically argued at that time that petitioner had failed to establish itself as a consumer under the Act. (App. to Pet. 42) This motion was overruled. Following the close of petitioner's evidence Kirby renewed its motion for

directed verdict on the claims under the Texas Deceptive Trade Practices Act. (App. to Pet. 44) This motion also was overruled. (App. to Pet. 45)

The jury found that Kirby had not converted petitioner's property and had not interfered with a contract of petitioner's, but found that Kirby had committed unconscionable acts. The jury found for Kirby on its counterclaim against petitioner for tortious interference but failed to find damages. The trial court entered judgment in favor of petitioner.

Kirby filed a Motion for Judgment Notwithstanding the Verdict or, Alternatively, for New Trial, on the grounds that petitioner was not a consumer under the Act and that the only basis for damages was the jury's finding of unconscionable action under the Act, and there was insufficient evidence to support the jury's finding on unconscionable action. (App. to Pet. 12) These motions were denied. (App. to Pet. 17)

Kirby appealed to the Fifth Circuit Court of Appeals seeking reversal and rendition of judgment or in the alternative, remand for a new trial. That court, following its in-depth review of the record, found that "Kirby properly preserved its objections to the sufficiency of the evidence by means of a motion for judgment notwithstanding the verdict." The court found the evidence insufficient to support the jury's finding of unconscionable conduct, and reversed and rendered judgment that petitioner take nothing.

REASONS FOR DENYING THE WRIT

1.

Respondent Kirby complied with Rule 50 by making a motion for directed verdict on Dwight's claims under the Texas Deceptive Trade Practices Act. That Act was the sole basis for Dwight's claims of unconscionable conduct. *Tex. Bus. & Comm. Code* §17.50(a)(3). This motion was first made following the conclusion of the testimony of Dwight Krzywonski, president of the petitioner corporation. It was renewed at the close of the petitioner's evidence. While it is true that the motion for directed verdict was not made again at the close of all of the evidence, this is not an absolute requirement. *Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223, 1228 (5th Cir. 1988); *Bohrer v. Hanes Corporation*, 715 F.2d 213, 216-17 (5th Cir. 1983). Kirby sufficiently complied with Rule 50 by making its motion for directed verdict at the conclusion of Krzywonski's testimony and again at the close of the petitioner's evidence.

Following the return of the verdict Kirby moved for judgment notwithstanding the verdict on Dwight's claims under the Texas Deceptive Trade Practices-Consumer Protection Act. On appeal to the Fifth Circuit Court of Appeals, Kirby complained of the insufficiency of the evidence to support the jury's finding of unconscionable conduct, and requested reversal *and rendition* or in the alternative, a new trial.

Kirby thus complied with the procedural prerequisites to obtain reversal and rendition of judgment in its favor, and Dwight's Petition for Writ of Certiorari should be denied.

2.

The holding of the court of appeals in this case is not "in conflict with" any of the holdings of the opinions of the Fifth Circuit, other circuits, or this Court cited by petitioner. The holding of the court of appeals is simply that the evidence is insufficient to support the jury's finding of unconscionable conduct on the part of Kirby. That holding does not conflict with any of the cases listed by petitioner.

3.

The Fifth Circuit Court of Appeals did not, as petitioner contends, substitute its factual findings for those of the jury. The Court analyzed the two-part definition of "unconscionable conduct" as contained in the Act and submitted to the jury.

The first part of the definition is conduct which "takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree." The court stated,

> Under these facts, it is impossible to conclude that Kirby took advantage of any "lack of knowledge, ability, experience, or capacity" of Dwight's "to a grossly unfair degree." The evidence in the record, therefore, does not support a recovery by Dwight's under subdivision A of section 17.45(5).

The second type of unconscionable conduct is that which "results in a gross disparity between the value received and consideration paid. . . ." The court held that the evidence did not support a finding of this sort of unconscionable conduct.

The court's holding was a legal determination of the sufficiency of the evidence. The court did not attempt to second-guess the jury or substitute its own findings for those of the jury.

4.

The Court of Appeals *did not hold,* as petitioner argues, that compliance with Rule 50 is not a necessary predicate to rendition of judgment on appeal. This is a pure and simple misstatement of the court's holding. The court did observe that Kirby properly preserved its complaint by means of a motion for judgment notwithstanding the verdict. (App. to Pet. 24) Kirby twice moved for a directed verdict on petitioner's claims under the Act, laying the proper predicate for a motion for judgment notwithstanding the verdict on petitioner's claims under the Act. Not having held that Rule 50 is not a predicate to rendition on appeal, the Fifth Circuit Court of Appeals is not in conflict with any other opinion cited by petitioner.

Most of the cases cited and relied on by petitioner involve the complete failure of the party challenging the judgment to make a motion for directed verdict and are therefore not applicable to this case. See for example *In re Owners of "Harvey Oil Center" v. Merchants Trust & Savings Bank,* 788 F.2d 275 (5th Cir. 1986), where the appellant sought to challenge the sufficiency of the evidence supporting the award of damages. Justice Jones stated: "Because Merchants failed to move for a directed verdict at the close of the plaintiffs' case, *see* Fed. R. Civ. P. 50(a), its motion for judgment notwithstanding the verdict on this point had no proper predicate." 788 F.2d at 278. See

also *Bunch v. Walter*, 673 F.2d 127 (5th Cir. 1982), where Justice Brown observed, "[O]ur review of the record reveals no motion by Bunch for directed verdict or for judgment notwithstanding the verdict." 673 F.2d at 129.

Because Kirby did move for a directed verdict at the close of petitioner's evidence on all of petitioner's claims under the Act, and filed a motion for judgment notwithstanding the verdict on petitioner's claims under the Act, the cases relied on by petitioner are not controlling.

5.

Respondent Kirby expressly sought and prayed for reversal and rendition of judgment in its favor in its Brief for Appellant in the court of appeals. Petitioner did not respond in its brief that the court of appeals was not procedurally authorized to reverse and render judgment, but instead spent a great deal of time chastising respondent for allegedly failing to include sufficient record references in its brief and requesting monetary sanctions against respondent and its attorneys personally for taking a frivolous appeal. By failing to complain about respondent's request for rendition until after it had lost in the court of appeals, petitioner waived any objection concerning procedural prerequisites for rendition of judgment. *Hoover v. Ronwin*, 466 U.S. 558, 574, 104 S.Ct. 1989, 80 L.Ed 2d 590, 603 n. 25 (1984). Respondent submits that the reason petitioner did not complain of respondent's prayer for reversal and rendition on the issue of unconscionablity is because it knew that respondent had moved for directed verdict and judgment notwithstanding the verdict on all of petitioner's claims under the Deceptive

Trade Practices-Consumer Protection Act, and only did so in its motion for rehearing in an effort to retrieve its unjustifiably favorable trial court judgment.

6.

Even under the standard of review applicable when a party does not move for a directed verdict or judgment notwithstanding the evidence, the holding and opinion of the Court of Appeals are correct and do not require review by this Court.

When no motion for directed verdict is made and no motion for judgment notwithstanding the verdict is filed, the Court of Appeals reviews the evidence to determine whether there was *any* evidence to support the jury's verdict, or whether plain error was committed which, if not corrected, would result in a gross miscarriage of justice. *In re Owners of "Harvey Oil Center", supra,* 788 F.2d at 278.

The court held that "there was insufficient evidence to support the jury's finding that Kirby's conduct was 'unconscionable' as defined in section 17.45(5)(A) and (B) of the DTPA." (App. to Pet. 28) The discussion following that holding makes it clear the court in reality was saying that there was *no* evidence to support the jury's finding of unconscionable conduct.

Under the first standard set out in §17.45(5)(A), the court said, "Under these facts, *it is impossible to conclude* that Kirby took advantage of any 'lack of knowledge, ability, experience, or capacity' of Dwight's 'to a grossly unfair degree'." (App. to Pet. 29) (Emphasis added.)

As to the second standard set out in §17.45(B) involving a gross disparity between value received and consideration paid, the court said, "subdivision B as well does not support the jury verdict." (App. to Pet. 29)

It is clear from the court's opinion that even were the court reviewing the record to determine whether *any* evidence supported the jury's finding of unconscionable conduct, the result would be the same. Based on the record, Kirby *did not* engage in unconscionable conduct against petitioner.

7.

This is not a case where the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. The issues attempted to be raised by petitioner in this case are not, contrary to petitioner's contention, of such importance to the Bench and Bar as to require this Court to resolve any conflict in decisions. The opinion of the court of appeals in this case, finding respondent's motion for judgment notwithstanding the verdict sufficient to preserve error, and then finding insufficient evidence to support the jury's finding of unconscionable conduct on Kirby's part, sets no precedent and does not "operate to overrule" any previous decision of any court. Petitioner's ruminations about anarchy in the courts are an effort to sway this Court with an emotional appeal because petitioner is unhappy with losing a judgment to which it was not entitled by the evidence. This is not an issue of importance to the public as distinguished from the parties to this litigation. *Rice v.*

Sioux City Cemetery, 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed 897, 904 (1954); *National Labor Relations Board v. Pittsburg Steamship Company*, 340 U.S. 498, 502, 71 S.Ct. 453, 95 L.Ed 479, 482 (1951).

The court of appeals minutely reviewed the voluminous record in this case and properly concluded that the finding of unconscionable conduct was not supported by the evidence. The court, and properly so, went so far as to characterize petitioner's argument for affirmance as "an affront to the principles of fair dealing." (App. to Pet. 30)

CONCLUSION & PRAYER

For all of the foregoing reasons respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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